necessary connection between the value of capital stock and earning capacity, so that even in cases of corporations without bonded debt there is no justice in this method. Such a basis of assessment, however, is upheld by the courts of California. *Spring Valley W. W.* v. *Schottler* (1882) 62 Cal. 69, 117. The reason for adding to the value of the shares of stock the value of the funded debt is that this indebtedness makes the stock worth just so much less. Taking the sum of the two is more just than the other method, since then heavily bonded corporations cannot escape. The argument is concisely stated in *State Railway Tax Cases* (1875) 92 U. S. 575, 605: "These mortgages are, however, liens on the road, and, taking precedence of the shares of the stockholder, may or may not extinguish the value of his shares. They must in any event affect that value to the exact amount of the aggregate debts. For all that goes to pay that debt and its interest diminishes *pro tanto* the dividend of the shareholder and the value of his share." It has been objected that when the tax is on bonds as well as on stock it will be inadequate, because applicable only to the bonds owned by residents of the State. But in Illinois this had been avoided by levying the tax not on stock and bonds, but on a valuation equal to the stock plus the bonds. The principal objection to this method is that corporations frequently pay no dividends and yet their stock has some speculative value; and in those cases the tax does not necessarily bear any relation to the earning capacity, for fluctuating, speculative values have no connection with the productiveness of corporate property. While this method, therefore, is superior to that in which the debt is not an element of assessment, all the objections to the latter are not obviated.

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WHERE AN AGENT COMMITS FRAUD AND ONE OF TWO INNOCENT PERSONS MUST SUFFER.—Few *dicta* have been the cause of more unsatisfactory decisions than the *dictum* of ASHURST, J., in *Lickbarrow* v. *Mason* (1787) 2 T. R. 63, 70, that "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Like a Delphic response it is often employed by opposing parties in the same contest, each maintaining that it was the other who ill-advisedly confided in him who proved a rogue, and therefore should be the sufferer. *Mussey* v. *Beecher* (1849) 3 Cush. 511. That it should be so used is natural: it but expresses a result that appeals to one as desirable, not a definite principle of law upon which one may predicate rights and liabilities. Mr. Bigelow's assertion that the statement "started when judges were feeling after the law, 'if haply they might find it,' is a dangerous one, so much so that the danger fairly overbalances its usefulness," Law of Bills, Notes and Cheques, 2ed. 204–205, is well illustrated by the recent decision of the English Court of Appeal in *Farquharson Brothers & Co.* v. *King & Co.* [1901] 2 K. B. 697.

The plaintiffs stored timber with a dock company and gave the dock company written authority to accept, for the transfer or delivery of the timber, orders signed by a certain clerk in the plaintiffs' employ, whom they authorized to sell timber as their agent. This clerk, in fraud of the plaintiffs, signed an order for the transfer of timber to a fictitious person in whose name he both sold it to the defendants and gave them orders upon the dock company by which they obtained delivery of the timber. The defendants were innocent purchasers for value. The plaintiffs sued for the timber or its value. The Court was to draw such inferences of fact as a jury might, and to give judgment accordingly.

Instead of working out the rights and liabilities of the parties primarily from those principles of common law which obtain between principal and agent and those who deal with such persons, A. L. SMITH, M. R., and V. WILLIAMS, L. J., seized upon the *dictum* of ASHHURST, J. as the main guide to their decision. Here was a case where "one of two innocent parties must suffer by the acts of a third." To their minds the plaintiffs rather than the defendants had enabled the clerk to commit the fraud; wherefore the plaintiffs, they held, should suffer. At the outset of their discussion, it is true, both judges met with this difficulty—the *dictum* was too broad. No one could say that, simply because a man had written his name on a piece of paper and so enabled another to write in the terms of a promissory note, he should be held liable on the paper even in the hands of an innocent purchaser for value; but neither judge considered this fact of sufficient weight to compel him to repudiate the *dictum*; so each proceeded to subject it to such limitations as seemed to him just and reasonable, or, as one might say in view of the authorities, to such, as he could impose and still hold the plaintiffs liable for the loss. "The conclusion at which I have arrived in relation to the matter," said V. WILLIAMS, L. J., (p. 713), "is that it never ought to be said that a person has within the meaning of the rule in question done an act which enables the third person to commit a fraud or occasion a loss unless the act relied on was one which was intended to be relied on by somebody." This limitation is far from clear in itself; but the learned Justice shows what he means by a subsequent statement that, as the dealing of the plaintiffs' clerk was "in pursuance of the power given to him, though not [he admits] in pursuance of the terms of the authority," the plaintiffs should bear the loss. This was evidently intended to bring Justice ASHHURST'S *dictum* into harmony with the doctrine of apparent or ostensible authority as that doctrine is generally understood.

With respect to third persons an agent may, indeed, bind his principal by the exercise of such power as his principal has held him out to them as having; because as to them the exercise of such power is within the scope, or terms, of his authority, *Pickering* v. *Busk* (1812) 15 East 38; whatever, as between him and his agent, may be the terms of the agent's instruction, *Hatch* v. *Taylor* (1840) 10 N. H., 538; but the exercise of all other power is void, *Martin* v. *Great Falls Mfg. Co.* (1837) 9 N. H. 51. So, if the plaintiffs are

bound in this case, it must be because they held their agent out to the defendants as having the power he used with respect to the defendants. What was this power? Neither more nor less than a dominion over the goods under an assumed name. How did he get it; from the plaintiffs? Most assuredly, no. The only power they had given him, in the sense in which that word is used in the law of agency, was to sell in his own name on their behalf; and even this they did not bring to the knowledge of the defendants so that they could rely upon it. It is here that this case differs radically from *Pickering* v. *Busk supra*, and *Henderson & Co.* v. *Williams* [1895] 1 Q. B. 521, in each of which the agent had apparent authority given him by his principal to sell in the capacity in which he did sell. Where a principal clothes his agent with *indicia* of ownership on which another does actually rely to his detriment, it may well be said that the principal should be estopped. But in the present case, in so far as the defendants beheld the plaintiffs' clerk clothed with *indicia* of ownership and relied upon the same, they were such *indicia* as he had obtained by theft or embezzlement and not by the act of the plaintiffs. It would, therefore, seem that the act of the plaintiffs, though "intended to be relied upon by somebody"—their clerk—did not give him the power "in pursuance" of which he dealt with the defendants, and that the limitation here advanced leaves the *dictum* of ASHHURST, J. too broad.

The limitation suggested by A. L. SMITH, M. R., is still less satisfactory—at least as applied to the present case. According to him the *dictum* may be accepted as sound, provided the act "relied upon as having enabled the third person to occasion the loss * * * be an act so far connected with the fraud that it may be looked upon as bringing about that fraud." Such a limitation he thought the only one that can be made without repudiating the *dictum* wholly; and that he refused to do. Now, if this limitation be regarded as the enunciation of an abstract principle of law, no objection to it can be made; but there is neither principle nor authority for holding that it applies to the facts of the present case. The Master of the Rolls considered it all important that the plaintiffs enabled their clerk "to get possession of the timber" and "armed him with power to give delivery orders" for the same, the argument being that in this the plaintiffs did an act which brought about his fraud. But fraud is not the natural consequence of confidence. A man "has the right to assume that his clerk won't commit a crime." *Shepard and Morse Lumber Co.* v. *Eldridge* (1898) 171 Mass. 516. Granting that the plaintiffs were negligent in giving their clerk the authority or power they did, "The proximate—that is the legal cause—'was the felony and crime' of the clerk and it cannot be said that the felony was either the natural or likely or necessary or direct consequence of the carelessness of the plaintiffs." BOWEN, L. J., in *Merchants of the Staple* v. *Bank of England* (1887) 21 Q. B. Div. 160.

It will thus be seen that the late learned Master of the Rolls differed radically from authorities generally as to what kind of act

directly brings about a fraud. The truth is, if the act is one which not only makes the fraud possible for the agent, but also is one on which the purchaser did reasonably rely, the principal should be bound, and only then, in accordance with the doctrine of apparent authority illustrated in *Pickering* v. *Busk*, *supra*. As applied to the facts of this case it is evident that this proposed limitation also leaves the *dictum* of ASHHURST J. too broad.

Other arguments might be urged against this decision, as pointed out in the admirable dissenting opinion of STIRLING, L. J. Thus it would seem that, as the various Factors Acts in England, passed for the express purpose of throwing the loss in cases analagous to the present on parties situated as these plaintiffs were, did not cover this case, it falls within the principle of those cases, where at common law those in the position of these defendants clearly should suffer. *Lamb* v. *Attenborough* (1862) 1 B. & S. 831.

The *dictum* of ASHHURST, J., unless one is willing to impose such limitations upon it as will make it express the doctrine of apparent or ostensible authority remains too broad. If such limitations be imposed, it will be apparent that the *dictum* serves no useful purpose.

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DIVERSION OF AN INTERSTATE WATERCOURSE.—The United States Circuit Court of Appeals has recently decided that the State of New York, in the exercise of its power of eminent domain, could not enable the City of New York, even on payment of due compensation, to divert the water of an unnavigable river, having its source in ponds in the State of New York, for general distribution and use in the City of New York, and thereby injure substantially riparian rights in the State of Connecticut, pertaining to a stream to which the river in New York was the principal tributary. *Pine and Muller* v. *The Mayor, etc., of the City of New York*, N. Y. Law Journal, Nov. 20, 1901; reported below (1900), 103 Fed. 337. The defense of the City was that the complainant's property rights taken by the defendant were easements dependent upon servitudes upon land in the State of New York, which servitudes the State of New York might under its own law extinguish, upon making compensation.

Whatever may be decided as to the rights of the riparian owner in a navigable stream (See 1 COLUMBIA LAW REVIEW, 121 and 552), there is no doubt that every proprietor, over whose land a private stream flows, has a natural right that it shall continue to flow to and from his premises in quantity, quality and manner as it is accustomed to flow. 3 Kent Com. 439; *United States* v. *Rio Grande Irrigation Co.* (1899) 174 U. S. 690. This is a property right, for the deprivation of which by the exercise of the power of eminent domain, compensation must be made. Lewis on Eminent Domain, 2nd ed. § 61; *Appeal of Haupt* (Pa. 1889) 17 Atl. 436. It is well settled, however, that the waters of a stream wholly within one State may be diverted to supply a city or village with water, and that an injunction will be denied the riparian owner who is injured thereby, provided due compensation is offered. *Lux* v. *Haggin*